TING SIEW HAW

v.

SASACOM SDN. BHD. & ORS.

HIGH COURT BORNEO, KOTA KINABALU
SYED AHAMAD IDID JC
[PETITION NO. KI OF 1991]
6 NOVEMBER 1991

CIVIL PROCEDURE: *Injunction - Application to set aside injunction - Whether imperative for the plaintiff to maintain the said injunction granted earlier - Allegation of victimisation - Seeking redress under law - Whether it is enough if the plaintiff shows that there is a serious question to be tried - Whether the American Cynamid rules to apply if no arguable defence - Whether balance of convenience in-point - Sections 128(2), 153, 158(4), 181 and Ch. IX of the Specific Relief Act 1950 and O. 29 r. 1(1) Rules of the High Court 1980.*

At the first instance, the Court upon the petitioner's *ex-parte* application for an injunction ordered and directed that the respondents, whether by themselves or by their servants or agents be restrained from delivering the vessels "Vision I" and "Vision II" docked at Labuan, to Perkapalan Mesra Sdn. Bhd. pending full verification that the vessels have complied with official procedures and that payment for the vessels had been effected to the first respondent." The petitioner undertook to abide by any order as to damages.

The respondents then filed a SIC under O. 32 r. 6 for an order that the above injunction be set aside and that the costs of such application to be borne by the petitioner. Before the learned Judge the parties could not come to any understanding. The learned Judge at the end of the hearing indicated that he will go through the evidence and look again at the petition to see if there were in fact proven grounds to have given the injunction. Since the injunction was granted earlier spanning an interval of time, the Court wanted to see that the grounds were strong then and sufficiently sound for the injunction to remain or whether it was imperative to be discharged.

Inter alia the Court observed that an injunction can remain provided the reasons for its grant continue to be relevant.

Held:

[1] The injunction was obtained by non-disclosure of certain facts which, had I been made aware of them, I would not have granted the injunction. Now it is clear that petitioner was not concerned for the welfare or life of the first respondent but to have it wound up. The Court cannot allow a litigant to use an injunction to shoot down his opponent. One must have a cause of action first.

[2] The terms of the injunction as applied for cannot be sustainable by reason:

(i) of the fact that whether or not official requirements had been satisfied should be within the purview of the marine and government authorities; and

(ii) that payment to first respondent should be first respondent's concern and not the business of the petitioner. The leading case of *Foss v. Harbottle* held in effect that an individual shareholder cannot sue for a wrong done to the company.

[Injunction dissolved and order-in-terms.]

Cases referred to:
The Siskina [1979] AC 210 ***(foll)***
Societe Generale & Ors v. City Holdings (Pte) Ltd & Anor. [1991] 2 MLJ 212 ***(dist)***
Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Bhd. & Ors [1982] 2 MLJ 162 ***(foll)***
Foss v. Harbottle [1843] 2 Hare 461; 67 ER 189 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 128(2), 153, 158(4), 181(1)(a), (1)(b), (2)(e)
Rules of the High Court 1980, O. 29 r. 1(1), O. 32 r. 6

Other source referred to:
Modern Equity, (13th Edn., 1989), Hanbury and Maudsley

For the petitioner - G. Patmanathan; M/s. Johnson T.S. Tan & Co.
For the respondents - Collin Goonting Lily Pu with him); M/s. Collin Goonting & Co.

JUDGMENT

Syed Ahmad Idid JC:

The Court upon the petitioner's *ex-parte* application for an injunction ordered and directed that the respondents, whether by themselves or by their servants or agents be restrained from delivering the vessels "Vision I" and "Vision II" docked at Labuan, to Perkapalan Mesra Sdn. Bhd. pending full verification that the vessels have complied with official procedures and that payment for the vessels had been effected to the 1st respondent. The petition for the injunction was heard quickly upon the filing of a certificate of urgency by George Pathmanathan of M/s. Johnson T.S. Tan & Co., of Labuan. The petitioner undertook to abide by any order as to damages.

The respondents then filed a summons-in-chambers under O. 32 r. 6 for an order that the above injunction be set aside and that the costs of such application be borne by the petitioner. This was placed before the Senior Judge on 16 August 1991. The parties could not come to any understanding then. It was adjourned to 4 September 1991 and then to 7 September 1991. I heard it finally in chambers on 4 October 1991. Mr. Collin Goonting, of Counsel for respondents assisted by Miss Lily Puk of Miri, the instructing solicitor for the respondents, and Mr. George Pathmanathan of Counsel for the applicant were present.

The injunction was granted on the affidavit dated 23 July 1991 where the petitioner averred that:

(a) he was a shareholder of the 1st respondent and that he held 49999 shares in his name (or 25% of the issued share capital of the 1st respondent);

b) he had been mandated to sign cheques at the Standard Chartered Bank but that since May 1991 this was not done;

(c) that 2nd defendant was "tyrannical" in his ways when dealing with suppliers;

(d) the series of events were part of a campaign by 2nd respondent to "destroy and sabotage the goodwill and credibility of ship repairing"; and

(e) on other grounds one of which alleged that the 2nd respondent was causing irreparable loss and damage to 1st respondent and its shareholders.

At the hearing on 4 October 1991, Mr. George Pathmanathan of Counsel for the petitioner referred to "a related Suit, that is K 163 of 1991 which is inexplicably connected with this matter between respondent and petitioner and two others." Mr. Pathmanathan further urged upon the Court:

(i) to maintain the injunction as his client had been injured and was a victim who sought redress under s. 181 of the Companies Act.

(ii) that the respondent had lied to this Court when he asserted that the cost for the construction of two vessels "Vision I" and "Vision II" was at RM2.5 million and later changed to RM6.4 million;

(iii) that the purported cancellation of his client's (or petitioner's) allotment of shares was improper and null and void by Article 32 and 37 of the memorandum of association. He claimed that the petitioner had paid RM49,000 plus for his shares:

(iv) that the removal of the petitioner as a director was also null and void for want of compliance with s. 128(2) of the Companies Act and there was no special notice as defined under s. 153. He contended that the register of members in which his client's name was missing was not *prima facie* proof that his client was not a member of 1st respondent - despite s. 158(4) which specified that the register of members shall be *prima facie* evidence;

(v) that 1st respondent was created to construct vessels and petitioner was brought into the 1st respondent because of his skills and technical know-how. It was understood that petitioner was to participate in the company but he was excluded.

I indicated at the end of the hearing on 4 October 1991 that:

> I will go through the evidence and look again at the petition to see if there were in fact proven grounds for me to have given the injunction. As I granted the injunction in July, I now want to see that the grounds were strong then and sufficiently sound to-day for the injunction to remain or else I will discharge it.

Injunction - Principles to be considered

(a) It is trite law that an application for an injunction must have a cause of action to entitle him to substantive relief. (The *Siskina* [1979] AC 210).

(b) The CJ (Malaya) in Supreme Court Civil Appeal No. 02-137-1991 stated:

> Under our law the jurisdiction to grant an injunction is expressed in Chapter IX of the Specific Relief Act 1950 (on the law of injunctions generally) which states that preventive relief may be granted at the discretion of the Court by injunction.

(c) O. 29 r. 1(1) of the Rules of the High Court, 1980 states:

> An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

Mr. Patmanathan when defending the injunction cited:

(a) *Societe Generale & Ors. v. City Holdings (Pte) Ltd. & Anor.* [1991] 2 MLJ 212 at p. 226 on the principles to be applied and these include:

(1) the plaintiff must establish that he has a good arguable claim to the right he seeks to protect;

(2) the Court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried:

(3) if the plaintiff satisfied these tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience; and

(b) a passage from *Hanbury and Maudsley in Modern Equity* (13th Edn., 1989):

(iii) where no arguable defence. It has been held the American Cyanamid rule do not apply where the defendant has no arguable defence. In such a case it is not necessary to consider the balance of convenience. Thus the plaintiff may obtain an interlocutory injunction to restrain a clear trespass even where it causes no damage; or to restrain a clear misapplication of union funds. It is probable is entitled almost as of right to an injunction to restrain a plain breach of a negative contract provides another example.

(c) He also cited Salleh Abas FJ, in *Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Bhd. & Ors.* [1982] 2 MLJ 162 at 163:

> ... the Court must be satisfied that there are serious questions to be gone into in that suit, lest an application for an injunction should be made on frivolous and vexatious grounds.

I reminded myself that I must re-examine the grounds on which the injunction had been based and see how and to what extent the grounds can be supported by the legal principles enunciated above. An injunction can remain provided the reasons for its grant continue to be relevant.

Application of law to the facts

The respondents, in my opinion, have rebutted the petitioner's claim that he held shares. I refer to Kiu Chiong Ming's (2nd respondent's) affidavit dated 7 August 1991. The petitioner was not able to prove to me that he had paid for the shares which had been alloted to him. In this respect, he misled this Court. The petitioner was never a registered shareholder in the 1st respondent company. Exhibit TSH1 was prepared by the company's secretary, Mr. Dansstan Lo' Ai Maga, but was not filed with the Registrar Of Companies as there was no monetary consideration made by the petitioner. Exh. KCM1 evidently did not show that the petitioner held any shares. I agree that, as rightly pointed out by Mr. Collin Goonting, the petitioner has no *locus standi.*

The petitioner made an allegation of fraud by insinuating that 2nd respondent had altered the mandate given to the bank but he did not offer any evidence to this effect. From the evidence before me, the petitioner was never denied access to the 1st respondent's office in Miri, Sarawak. The petitioner was however prevented from entering the 1st respondent's shipbuilding yard after the petitioner had been removed as a director. The petitioner had on 21 June 1991 trespassed into the 1st respondent's office and forcibly took journal vouchers, payment vouchers, receiving vouchers, cash and bank book, creditors record book, bills and invoices and computer diskettes. A police report was lodged by 1st respondent's officer, Encik Abdul Wahab bin Aman, *vide* Report No. 1177/91 on 23 June 1991 (see Exh. KCM3).

Even after the payment of the total contract sum, the 1st respondents were not able to complete the construction of the "vessels'. Perkapalan Mesra Sdn. Bhd. then undertook to complete the construction and the vessels were handed to them on the 10 June 1991. (See Exhs. KCM9 and KCM10). This, in effect, meant that the 1st respondents were no longer in possession of the vessels as at 10 June 1991, long before the application for an injunction was filed in Court. Merely on this ground, the injunction should be lifted.

The petitioner and 2nd respondent were at cross purposes. Counsel later explained that petitioner's wish for the injunction to remain was to "wind up the company (1st respondent)

because the joint venture between the petitioner and 1st respondent has disappeared." So it was crystal clear at last that the petitioner was only interested in winding up 1st respondent because his joint venture agreement had been side tracked and he had no longer any part in the shipbuilding activities of 1st respondent. The Court, with the view to bringing to an end or remedying the matters complained of, may order (at s. 181(2)(e)) that the company be wound up.

Can this satisfy ss. 181(1) (a) or (b) of the Companies Act 1965? I cannot agree that the petitioner is an oppressed party under these circumstances.

There are choices but I prefer to accept that:

(i) the certified true copy of search dated 6 August 1991 at Exh. KCM1 from Penolong Pendaftar Syarikat, Sarawak, indicated that the authorised share capital was at RM25,000 so it was not possible for petitioner to have paid his RM49,999;

(ii) his name did not appear on the register of members;

(iii) there was no dispute that petitioner was the managing director up to 20 June 1991 when he was removed as a director. The solicitors' letter dated 26 June 1991 told him of his removal and he did not disclose this when he petitioned for the injunction in July. Article 95 of the memorandum of association refers. The subject of removal may be a cause for a claim but certainly it cannot form the basis for any application for an injunction in this instance;

(iv) it was the petitioner who wanted to damage the 1st respondent and to delay the completion of the vessels. His actions speak ill of his attitude and I cannot see any "oppression" of him by the respondent.

Conclusion

I am in agreement with Mr. Collin Goonting that the continuation of the injunction will be damaging and harmful to the 1st respondent. The injunction was obtained by non-disclosure of certain facts which, had I been made aware of them, I would not have granted the injunction. Now it is clear that petitioner was not concerned for the welfare or life of the 1st respondent but to have it wound-up. The Court cannot allow a litigant to use an injunction to shoot down his opponent. One must have a cause of action first. Additionally, the terms of the injunction as applied for cannot be sustainable by reason:

(i) of the fact that whether or not official requirements had been satisfied should be within the purview of the marine and government authorities; and

(ii) that payment to 1st respondent should be 1st respondent's concern and not the business Reprints of the petitioner. The leading case of *Foss v. Harbottle* [1843] 2 Hare 461, 67 ER 189 held effect that an individual shareholder cannot sue for a wrong done to the company.

Accordingly, on the facts above and within the principles and the law I have discussed, I dissolve the injunction granted to petitioner on 29 July 1991. I order that:

(i) petitioner pay the costs of this action;

(ii) the Senior Assistant Registrar fix a date and hear the parties in respect of damages which respondents may have suffered but such damages shall be confined to the period not later than and not after 24 October 1991, that is the date which the Court has fixed for delivery of this judgment but on which date the Counsel for the respondents (the

applicants here) was absent thereby necessitating the postponement of delivery to a later date; and

(iii) I further order the petitioner shall pay for such damages, if any, in accordance with his undertaking and the justice of the case, within seven days of the Senior Assistant Registrar's decision in (ii) above.

Also found at [1992] 2 CLJ 892